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No. 86-1386

In the Supreme Court of the United States

OCTOBER TERM, 1986

JORGE SALGADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MAURY S. EPNER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether evidence seized pursuant to a search warrant, but earlier seen in a warrantless search, should be suppressed.

2. Whether the district court imposed an appropriate sentence on petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A32) is reported at 807 F.2d 603.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4-A5) was entered on December 5, 1986. On January 30, 1987, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 5, 1987, and the petition was filed on February 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring, in violation of 21 U.S.C. 846, to distribute cocaine and to possess cocaine

with intent to distribute it (Count 1); one count of distributing 50.6 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 2); two counts of possessing in excess of one kilogram of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 3 and 4); and one count of using a mobile telephone to facilitate the conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 843(b) (Count 5). He was sentenced to a total of 20 years' imprisonment and $500,000 in fines and was ordered to serve a lifetime special parole term following his release from confinement.

1. The evidence at trial established that on May 30, 1985, DEA Task Force Officer Augustus Lett learned from a confidential informant that petitioner wished to sell cocaine. The following day Officer Lett, accompanied by a surveillance team, met petitioner at the informant's Chicago home. Petitioner arrived at the house carrying two black bags, one of which contained a portable telephone. Petitioner explained to Lett that he did not physically carry his cocaine with him, but instead used his telephone to contact "a guy carrying it for me. He is circling the neighborhood, and if everything's okay he is going to bring the stuff in." Tr. 85-87, 90-91, 117, 167-169, 176-177.

Petitioner's telephone then rang. He listened, said "okay," and asked Officer Lett to show him the money he had brought to purchase the cocaine. Petitioner and Lett then left the residence and walked one block to where Clarence Travis, another undercover agent, was parked. At approximately the same time, petitioner's confederate, Hernando Bernal, entered the house carrying a red-orange bag. Tr. 91, 168-169, 172-173.

Officer Lett introduced petitioner to Travis, who displayed a large roll of cash. After petitioner counted the money, he instructed Travis to park in front of the informant's house, and he told Lett to return with him "and

check the stuff." Petitioner added: "If the stuff is alright, you take [it] and I will come out and get the money from your guy." On his return to the residence, Lett met Bernal, who placed a box on top of the red-orange bag. Petitioner opened the box, slit a foil wrapping to expose a compressed brick of white powder, assured Lett that "[t]his is the finest you can get," and invited him to "test it any way you want." Lett then purchased one ounce of the powder, ostensibly for the purpose of testing, and paid petitioner $1500. Tr. 91-94.

Lett assured petitioner that he would telephone petitioner after testing the powder. Petitioner's phone then rang, and he spoke to the caller in Spanish. After finishing the conversation, he said to Lett, "You see, I am a busy man. That was an order for five kilos." Petitioner then directed Bernal to take the box filled with powder and meet him with five kilograms of cocaine. Lett then left the residence and, contacting the surveillance agents by radio, told them he had just paid petitioner $1500 for one ounce of powder and that Bernal had a large brick of the same powder. Lett thereafter conducted a field test on the powder and found it to contain cocaine. Tr. 95-97.

After petitioner and Bernal left the informant's residence and separated, surveillance agents followed each of them. Petitioner was arrested 30 minutes later. During a search incident to his arrest, agents found $1300 of the $1500 Lett had paid him, together with several keys and a receipt from a locksmith. The receipt indicated that a new lock had been installed several days earlier at 2580 West Golf Road, in a Chicago suburb called Glenview, and that the work had been performed for petitioner. One of the surveillance agents, Agent Nyman, then took the keys and proceeded to the address on the receipt. Tr. 174, 183, 187, 189, 195-196, 291-292.

Bernal also was arrested after leaving the informant's residence. Incident to his arrest, the agents seized the red-

orange bag and the package of cocaine he had displayed for Officer Lett. Asked about the source of the cocaine, Bernal directed the arresting officers to 2600 West Golf Road in Glenview, the building immediately adjacent to 2580 West Golf Road. After Agent Nyman arrived, all the agents met and spoke to a janitor who served both buildings. The janitor informed the agents that petitioner recently had moved to Apartment 211 in the 2580 building. Officer Thomas Bridges then took the keys Nyman had seized from petitioner, entered Apartment 211, and conducted a cursory search. The apartment was unfurnished, and no one was in it. Bridges saw a white plastic box in the kitchen, a suitcase and a balance beam scale on the bedroom floor, and a money-counting machine in the living room. He did not touch anything in the apartment, and he opened no closets or other closed areas. Following his search, Bridges secured the apartment while awaiting a search warrant. Tr. 212-215, 219, 226, 229-230, 236-242, 245-246.

Four hours later, another group of agents arrived with a search warrant and conducted a thorough search of petitioner's apartment. They seized all the items Officer Bridges had seen earlier, plus more than 13 kilograms of cocaine. The warrant was based on an affidavit prepared by Officer Lett describing the circumstances in which petitioner and Bernal had been arrested and establishing that the apartment to be searched was indeed petitioner's and was probably the place from which Bernal had obtained the cocaine that he was carrying. Lett's affidavit, however, did not refer to anything that Officer Bridges had seen during his earlier warrantless search, and the warrant itself made no specific reference to anything seen by Bridges. Tr. 216-219, 221, 223-229, 225-257; Pet. App. A13-A14.

2. Before trial, petitioner moved to suppress the evidence seized from Apartment 211. The district court denied the motion (Pet. App. A38), and the court of appeals affirmed.

Petitioner argued that Officer Bridges' warrantless search was unlawful and that it tainted the subsequent, warrant-authorized search. He also argued that all the evidence that Bridges saw during this search had been "seized" by his having seen it. Because the evidence had already been unlawfully "seized," petitioner argued, the authorities were not free to seize the evidence once again under authority of a search warrant. The court of appeals rejected both arguments.

First, the court rejected petitioner's claim that Bridges' warrantless search tainted the agents' subsequent, warrant-authorized search. Without deciding whether Bridges' warrantless search was in fact unlawful, the court of appeals concluded that it was "reasonably plain that the search warrant would have been applied for, issued, and executed even if Bridges had never conducted the allegedly unlawful search" (Pet. App. A16). As there was "abundant[] * * * probable cause for obtaining a warrant" independent of anything Officer Bridges observed during his warrantless search, the court of appeals concluded that "the warrant would have been obtained and executed even if Bridges had never made his search" (*id.* at A17). Relying on this Court's decision in *Segura* v. *United States,* 468 U.S. 796 (1984), the court found that the subsequent, warrant-authorized search therefore was not tainted by Officer Bridges' earlier search, even assuming that the earlier search was unlawful (Pet. App. A17).

The court of appeals did not address petitioner's assertion that Officer Bridges, by viewing certain of the evidence inside petitioner's apartment during his warrantless search, unlawfully "seized" that evidence. Instead, the court ruled that "whether there is an interim illegal seizure of evidence is irrelevant to the issue of exclusion, provided there is (as there is here) very great confidence that the evidence would have been obtained for use at trial even if there had not been that seizure" (Pet. App.

A25-A26). In reliance on *Nix* v. *Williams,* 467 U.S. 431, 444-448 (1984), and *United States* v. *Silvestri,* 787 F.2d 736 (1st Cir. 1986), petition for cert. pending, No. 86-678, the court of appeals concluded "that the exclusionary rule does not require the exclusion of evidence that would have been obtained lawfully, just in order to punish a search that did not harm the defendant in any sense relevant to a criminal proceeding * * *. Since the evidence would have been obtained anyway, the alleged violation of [petitioner's] rights was not a cause, in the legal sense, of his conviction." Pet. App. A20.[1] Accordingly, the court found it unnecessary to decide "whether the [warrantless] search Bridges conducted was lawful" (*id.* at A28).

ARUGMENT

1. a. Petitioner asserts (Pet. 21-37) that the court of appeals improperly applied the inevitable discovery doctrine or the independent source doctrine to the facts of this case. On March 9, 1987, after the petition in this case was filed, the Court granted certiorari in *Murray* v. *United States,* No. 86-995. In that case, the Court will decide whether and in what circumstances the inevitable discovery doctrine or the independent source doctrine permits the use of evidence seen during a warrantless search

[1] In so holding, the court of appeals carefully distinguished this case, in which the government secured a valid search warrant, from cases in which the government had no intention of obtaining such a warrant but claims "it would have gotten a warrant if it had asked for one" (Pet. App. A27). To allow the admission of evidence under an exception to the exclusionary rule in the latter case, the court observed, "would defeat the purpose of requiring a warrant * * * [and] would be like saying that lynching a man is okay provided you have a well-grounded belief that if tried he would have been convicted and sentenced to death and the sentence carried out" (*ibid.*).

but later seized pursuant to an untainted search warrant that would inevitably have been obtained. We intend to argue in *Murray* that the principles of *Nix* v. *Williams*, 467 U.S. 431 (1984), allow the use of such evidence whenever the finder of fact determines, by a preponderance of the evidence, that the lawful, warrant-authorized search would inevitably have occurred. The decision below is consistent with that view, and, if we prevail in *Murray*, the present petition should be denied. If, however, the Court reverses in *Murray*, the Court may wish to remand this case for further consideration in light of the Court's analysis in *Murray*.

b. In addition to arguing that the evidence should not have been admitted under the independent source doctrine or the inevitable discovery doctrine, petitioner raises a fact-bound claim that the warrant in this case was based on false statements and illegally obtained evidence and that, but for the tainted matter, it did not establish probable cause. That claim does not warrant review and is without merit.

Petitioner "submits" (Pet. 25) that the agents must have relied on Bridges' warrantless search for the probable cause necessary to secure the warrant that authorized the search of his apartment. In support, he points to the fact that Officer Lett's affidavit provided that he "ha[d] reason to believe that * * * [t]he following property is concealed: Cocaine, United States currency, books, papers, documents, weighing scales, and other packaging materials." Pet. App. A41; see Pet. 24. Petitioner argues that the information in Officer Lett's possession at the time he prepared the affidavit, exclusive of anything he might have learned from Officer Bridges, furnished no basis for believing petitioner's apartment contained the listed items. Thus, he reasons, Lett must have relied on information derived from Bridges' warrantless search in preparing his affidavit.

There is no merit to this claim. If Lett had relied on Bridges for his information, he would have known to specify a money-counting machine, a white plastic box, and a suitcase—items viewed by Bridges during his warrantless search—among the items believed to be in petitioner's apartment. Similarly, he would have had no reason to specify such items as currency, books, papers, documents, or packaging materials, as Bridges saw none of those things during his earlier search.

c. Petitioner also argues (Pet. 25-28) that Lett's affidavit contained a number of factual inaccuracies that, taken together, divested the authorities of probable cause for obtaining a search warrant. In fact, however, the only errors appearing in the affidavit concerned the address of petitioner's building (whether it was 2580 or 2600 West Golf Road) and the identity of the person who advised the agents that petitioner lived in Apartment 211 of the 2580 building (whether it was a janitor or a building manager). See Pet. App. A46. Those factual errors, when set to one side, hardly undercut the "abundant[] * * * probable cause for obtaining a warrant" (*id.* at A17) that existed in this case. See *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978).

2. Petitioner also raises a number of challenges to the sentence imposed by the district court. He concedes (Pet. 18), however, that he failed to present any of these arguments to either the district court or the court of appeals.[2] Accordingly, he is foreclosed from raising them in

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[2] Petitioner asks this Court to determine whether counsel's failure to raise these issues below deprived him of the effective assistance of counsel in violation of the Sixth Amendment (Pet. 19-21). Whatever the merits of that fact-bound claim, it is plain that review by this Court in the first instance is not the appropriate means to adjudicate that claim.

this Court for the first time. *Berkemer* v. *McCarty,* 468 U.S. 420, 443 (1984); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States,* 355 U.S. 339, 362 n.16 (1958). Whatever the merits of petitioner's claims regarding his sentence, there is no reason for this Court to exercise its certiorari jurisdiction in order to review issues that were not presented to or decided by the courts below.

a. Petitioner's statutory and Eighth Amendment claims that his sentence is illegal (Pet. 37-42, 51-57, 60-62) may be presented to the district court "at any time" (Fed. R. Crim. P. 35(a)).[3] If any of these claims has merit, therefore, petitioner has a forum in which to present it without the necessity of intervention by this Court at this stage.

We note, in any case, that petitioner was subject, *without* enhancement under 21 U.S.C. 851(a)(1),[4] to a maximum total sentence of 79 years' imprisonment and $905,000 in fines: 20 years' imprisonment and $250,000 fines on each of Counts 1, 3, and 4 (see 21 U.S.C. (Supp. III) 841(b)(1)(A)(ii) and 21 U.S.C. 846); 15 years' im-

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[3] Petitioner's objection to the manner in which his lifetime special parole term was imposed (Pet. 58-60) may well not be one of the issues that may be presented "at any time" under Rule 35(a), but in any event it is frivolous. The district court imposed the lifetime special parole term in the presence of the defendant on December 17, 1985 (see Pet. App. A33-A34, A35). The order entered three days later did not, as petitioner claims, "amend[] an existing sentence by adding a mandatory parole term" (Pet. 58); rather, it clarified that the special parole term was previously imposed under Counts 2 and 3 (see Pet. App. A36).

[4] Although the prosecution in this case sought enhanced punishment under Section 851(a)(1) in view of petitioner's prior conviction for possessing controlled substances with intent to distribute them (see Pet. App. A50-A52), the district court made no reference to the enhancement provision in its judgment and commitment order (*id.* at A33-A34), and no such reference appears in the district court's docket sheet (*id.* at A35). Petitioner nevertheless claims (Pet. 51-56) that he was improperly given enhanced sentences under Section 851.

prisonment and a $125,000 fine on Count 2 (see 21 U.S.C. (Supp. III) 841(b)(1)(B)); and four years' imprisonment and a $30,000 fine on Count 5 (see 21 U.S.C. 843(c)).[5] In addition, petitioner's conviction on Count 2 required the imposition of a special parole term of at least three years (see 21 U.S.C. (Supp. III) 841(b)(1)(B)), and—as petitioner recognizes (Pet. 61 n.7)—every court to consider the question has concluded that a lifetime special parole term is authorized by the statute. See *United States* v. *Bridges*, 760 F.2d 151, 153 (7th Cir. 1985) (collecting cases).[6] Petitioner's total sentence of 20 years' imprisonment, $500,000 in fines, and a lifetime special parole term thus falls well within the maximum to which he was subject.

b. Petitioner also claims (Pet. 43-46) that the district court's decision to impose sentence under both Counts 2 and 3 conflicts with *United States* v. *Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc). There is no merit to this claim.

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[5] Petitioner apparently claims (Pet. 38-42) that the maximum allowable sentence on each of Counts 1, 3, and 4 was only 15 years' imprisonment and a $125,000 fine under 21 U.S.C. (Supp. III) 841(b)(1)(B), rather than 20 years' imprisonment and a $250,000 fine under 21 U.S.C. (Supp. III) 841(b)(1)(A)(ii), because the trial court's instructions would have permitted the jury to convict on those counts without finding that they involved a kilogram or more of cocaine. We disagree with petitioner's contention (for which he cites no support) that the involvement of a kilogram or more of a cocaine is a jury matter. In any event, the jury was instructed as to the amounts of cocaine involved in Counts 3 and 4 (see Pet. App. A76-A77), on which the conspiracy alleged in Count 1 was based. Moreover, even if petitioner were right and we were wrong, the maximum total allowable sentence for petitioner's offenses would still be 64 years' imprisonment and a total fine of $530,000—a sentence greater than petitioner received.

[6] Petitioner argues that, because a life sentence without parole for writing a $100 bad check has been held disproportionate to the offense in violation of the Eighth Amendment (*Solem* v. *Helm*, 463 U.S. 277 (1983)), a lifetime special parole term for the serious drug offenses involved in this case is unconstitutional (Pet. 60-62). That argument is frivolous.

In *Palafox,* the defendant planned to sell a single package of heroin to an undercover DEA agent. At a meeting of the two, the agent asked for a .12-gram sample of the heroin before purchasing the remainder. Almost immediately after the officer was furnished the sample, but before the transaction was completed, the defendant was arrested. He was charged with and convicted of distributing the .12-gram sample as well as possessing the remainder of the package with intent to distribute it, both in violation of 21 U.S.C. 841(a)(1). He was then sentenced to concurrent five-year prison terms (764 F.2d at 559). The court of appeals subsequently concluded that, although the defendant could be charged with and found guilty of both distributing heroin and possessing the remainder of the same package with intent to distribute it, he could not be convicted and sentenced under both counts. Instead, the court held that "where the defendant distributes a sample and retains the remainder for the purpose of making an immediate distribution to the same recipients at the same place and at the same time," the defendant may be punished only once (*id.* at 560).

Petitioner's claim that his sentence conflicts with *Palafox* does not warrant review. Had the issue been raised below, the court of appeals easily could have distinguished the facts of this case from those in *Palafox.* In this case, unlike that one, the undercover agent actually paid for his sample. In addition, petitioner and Officer Lett agreed that Lett would contact petitioner on a later occasion, after testing the sample petitioner had sold him, in the event he wished to purchase the remainder. The second, unconsummated transaction in this case accordingly was separated in both time and location from the initial, consummated sale. This case therefore is distinguishable on its facts from the narrow holding in *Palafox.* See

United States v. *Rodriguez-Ramirez,* 777 F.2d 454 (9th Cir. 1985) (distinguishing the court's own recently decided *Palafox* case on identical grounds).

Similarly, there is no merit to petitioner's assertion (Pet. 46-51), also raised for the first time in this Court, that Counts 3 and 4 of the indictment are multiplicitous. Those counts charged petitioner with separate possessions of cocaine with intent to distribute it. Petitioner claims that, by convicting and sentencing him under both counts, the district court placed him twice in jeopardy for the same offense. Count 3 charged petitioner with possessing, in Chicago, 1.3 kilograms of cocaine (see Pet. App. A67), and Count 4 charged him with possessing, at his Glenview apartment, 18.39 kilograms of cocaine (*id.* at A68). The cocaine seized in Chicago, moreover, was 93% pure, whereas much of the cocaine seized from his apartment in Glenview was 92% pure (Tr. 255-257). As different evidence as to location, quantity, and purity was necessary to establish petitioner's guilt under the two possession counts, each properly charged him with a separate offense. *United States* v. *Rich,* 795 F.2d 680, 682-683 (8th Cir. 1986); *United States* v. *Griffin,* 765 F.2d 677, 682-683 (7th Cir. 1985); *United States* v. *Blakeney,* 753 F.2d 152, 154-155 (D.C. Cir. 1985); *United States* v. *Privett,* 443 F.2d 528, 531 (9th Cir. 1971).[7]

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[7] *United States* v. *Woods,* 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972 (1978), on which petitioner relies (Pet. 46-47), is inapposite. In that case, unlike this one, the court of appeals vacated the defendant's three separate convictions for possessing cocaine with intent to distribute it because all three packages of cocaine at issue in the three counts were seized at the same time from a single location and were virtually identical in both weight and purity (568 F.2d at 510-511).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Murray* v. *United States,* No. 86-995.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MAURY S. EPNER
Attorney

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